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SENATE BILL 243

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Richard C. Martinez

AN ACT

RELATING TO FIRE PREVENTION; ENACTING THE SAFER CIGARETTE AND
FIREFIGHTER PROTECTION ACT; IMPOSING PENALTIES; MAKING AN
APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Safer Cigarette and Firefighter Protection Act".

Section 2. DEFINITIONS.--As used in the Safer Cigarette
and Firefighter Protection Act:

A. "agent" means any person authorized by the
taxation and revenue department to purchase and affix stamps on
packages of cigarettes;

B. "cigarette" means:

(1) any roll of tobacco wrapped in paper or in
any substance not containing tobacco; or

1 (2) any roll of tobacco wrapped in any
2 substance containing tobacco that, because of its appearance,
3 the type of tobacco used in the filler or its packaging and
4 labeling, is likely to be offered to or purchased by consumers
5 as a cigarette as described in Paragraph (1) of this
6 subsection;

7 C. "manufacturer" means:

8 (1) any entity that manufactures or otherwise
9 produces cigarettes or causes cigarettes to be manufactured or
10 produced that are intended to be sold in New Mexico, including
11 cigarettes intended to be sold in New Mexico through an
12 importer; or

13 (2) any entity that becomes a successor of an
14 entity described in Paragraph (1) of this subsection;

15 D. "quality control and assurance program" means
16 the laboratory procedures implemented to ensure that operator
17 bias, systematic and nonsystematic methodological errors and
18 equipment-related problems do not affect the results of the
19 testing and that the testing repeatability remains within the
20 required repeatability values in Subsection C of Section 3 of
21 the Safer Cigarette and Firefighter Protection Act for all test
22 trials used to certify cigarettes under that act;

23 E. "repeatability" means the range of values within
24 which the repeat results of cigarette test trials from a single
25 laboratory will fall ninety-five percent of the time;

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1 F. "retail dealer" means any person, other than a
2 manufacturer or wholesale dealer, engaged in selling cigarettes
3 or tobacco products;

4 G. "sale" or "sell" means a transfer of or an offer
5 or agreement to transfer title or possession by exchange,
6 barter or any other means. In addition to cash and credit
7 sales, giving cigarettes as samples, prizes or gifts and
8 exchanging cigarettes for any consideration other than money is
9 a "sale"; and

10 H. "wholesale dealer" means any person other than a
11 manufacturer who sells cigarettes or tobacco products to retail
12 dealers or other persons for purposes of resale and any person
13 who owns, operates or maintains one or more cigarette or
14 tobacco product vending machines on premises owned or occupied
15 by another person.

16 Section 3. TEST METHOD AND PERFORMANCE STANDARD.--

17 A. Except as provided in Subsection K of this
18 section, cigarettes shall not be sold or offered for sale in
19 New Mexico unless:

20 (1) the cigarettes have been tested in
21 accordance with the test method and meet the performance
22 standard specified in this section;

23 (2) a written certification has been filed by
24 the manufacturer with the state fire marshal in accordance with
25 Section 4 of the Safer Cigarette and Firefighter Protection

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1 Act; and

2 (3) the cigarettes have been marked in
3 accordance with Section 5 of that act.

4 B. Testing of cigarettes shall be conducted in
5 accordance with the American society of testing and materials
6 standard E2187-04 standard test method for measuring the
7 ignition strength of cigarettes and shall be conducted on ten
8 layers of filter paper. No more than twenty-five percent of
9 the cigarettes tested in a test trial in accordance with this
10 section shall exhibit full-length burns. Forty replicate tests
11 shall constitute a complete test trial for each cigarette
12 tested. The performance standard required by this section
13 shall only be applied to a complete test trial. Written
14 certifications shall be based upon testing conducted by a
15 laboratory that has been accredited pursuant to standard
16 ISO/IEC 17025 of the international organization for
17 standardization or other comparable accreditation standard
18 required by the state fire marshal.

19 C. Laboratories conducting testing in accordance
20 with this section shall implement a quality control and quality
21 assurance program that includes a procedure that will determine
22 the repeatability of the testing results. The repeatability
23 value shall be no greater than 0.19.

24 D. Testing performed or sponsored by the state fire
25 marshal to determine a cigarette's compliance with the

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1 performance standard required by this section shall be
2 conducted in accordance with this section.

3 E. This section does not require additional testing
4 if cigarettes are tested consistent with the Safer Cigarette
5 and Firefighter Protection Act for any other purpose.

6 F. Each cigarette listed in a certification
7 submitted pursuant to Section 4 of the Safer Cigarette and
8 Firefighter Protection Act that uses lowered permeability bands
9 in the cigarette paper to achieve compliance with the
10 performance standard set forth in this section shall have at
11 least two nominally identical bands on the paper surrounding
12 the tobacco column. At least one complete band shall be
13 located at least fifteen millimeters from the lighting end of
14 the cigarette. For cigarettes on which the bands are
15 positioned by design, there shall be at least two bands fully
16 located at least fifteen millimeters from the lighting end and
17 ten millimeters from the filter end of the tobacco column or
18 ten millimeters from the labeled end of the tobacco column for
19 non-filtered cigarettes.

20 G. A manufacturer of a cigarette that the state
21 fire marshal determines cannot be tested in accordance with the
22 test method prescribed in Subsection B of this section shall
23 propose a test method and performance standard for the
24 cigarette to the state fire marshal. Upon approval of the
25 proposed test method and a determination by the state fire

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1 marshal that the performance standard proposed by the
2 manufacturer is equivalent to the performance standard
3 prescribed in Subsection B of this section, the manufacturer
4 may employ that test method and performance standard to certify
5 the cigarette pursuant to Section 4 of the Safer Cigarette and
6 Firefighter Protection Act. If the state fire marshal
7 determines that another state has enacted reduced cigarette
8 ignition propensity standards that include a test method and
9 performance standard that are the same as those contained in
10 the Safer Cigarette and Firefighter Protection Act, and the
11 state fire marshal finds that the officials responsible for
12 implementing those requirements have approved the proposed
13 alternative test method and performance standard for a
14 particular cigarette proposed by a manufacturer as meeting the
15 fire safety standards of that state's law or regulation under a
16 legal provision comparable to this section, the state fire
17 marshal shall authorize that manufacturer to employ the
18 alternative test method and performance standard to certify
19 that cigarette for sale in New Mexico, unless the state fire
20 marshal demonstrates a reasonable basis why the alternative
21 test should not be accepted under the Safer Cigarette and
22 Firefighter Protection Act. All other applicable requirements
23 of this section shall apply to the manufacturer.

24 H. Each manufacturer shall maintain copies of the
25 reports of all tests conducted on all cigarettes offered for

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1 sale for a period of three years and shall make copies of the
2 reports available to the state fire marshal and the attorney
3 general upon written request. Any manufacturer who fails to
4 make copies of the reports available within sixty days of
5 receiving a written request may be assessed a civil penalty not
6 to exceed ten thousand dollars (\$10,000) for each day after the
7 sixtieth day that the manufacturer does not make the copies
8 available.

9 I. The state fire marshal may adopt a subsequent
10 American society of testing and materials standard test method
11 for measuring the ignition strength of cigarettes upon a
12 finding that the subsequent method does not result in a change
13 in the percentage of full-length burns exhibited by any tested
14 cigarette when compared to the percentage of full-length burns
15 the same cigarette would exhibit when tested in accordance with
16 the American society of testing and materials standard
17 performance E2187-04 and the standard in Subsection B of this
18 section.

19 J. The state fire marshal shall review the
20 effectiveness of this section and report findings and make
21 recommendations to the legislature every three years.

22 K. The requirements of Subsection A of this section
23 shall not prohibit:

24 (1) wholesale or retail dealers from selling
25 their existing inventory of cigarettes on or after the

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1 effective date of this section if the wholesale or retail
2 dealer can establish that state tax stamps were affixed to the
3 cigarettes prior to the effective date and the wholesale or
4 retail dealer can establish that the inventory was purchased
5 prior to the effective date in comparable quantity to the
6 inventory purchased during the same period of the prior year;
7 or

8 (2) the sale of cigarettes solely for the
9 purpose of consumer testing. For purposes of this subsection,
10 the term "consumer testing" means an assessment of cigarettes
11 that is conducted by a manufacturer, or under the control and
12 direction of a manufacturer, for the purpose of evaluating
13 consumer acceptance of the cigarettes, utilizing only the
14 quantity of cigarettes that is reasonably necessary for an
15 assessment.

16 L. The Safer Cigarette and Firefighter Protection
17 Act shall be interpreted and construed to effectuate its
18 general purpose and to make that act uniform with the laws of
19 those states that have enacted reduced cigarette ignition
20 propensity laws as of the date that the Safer Cigarette and
21 Firefighter Protection Act is enacted.

22 Section 4. CERTIFICATION AND PRODUCT CHANGE.--

23 A. Each manufacturer shall submit to the state fire
24 marshal a written certification attesting that each cigarette
25 listed in the certification has been tested in accordance with

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1 the test method and meets the performance standard in Section 3
2 of the Safer Cigarette and Firefighter Protection Act.

3 B. Each cigarette listed in the certification shall
4 be described with the following information:

5 (1) the brand or the trade name on the
6 package;

7 (2) the style, such as light or ultralight;

8 (3) the length in millimeters;

9 (4) the circumference in millimeters;

10 (5) the flavor, such as menthol or chocolate,
11 if applicable;

12 (6) whether the cigarette has a filter or is a
13 nonfilter cigarette;

14 (7) the package description, such as soft pack
15 or box;

16 (8) the marking pursuant to Section 5 of the
17 Safer Cigarette and Firefighter Protection Act;

18 (9) the name, address and telephone number of
19 the laboratory, if different than the manufacturer that
20 conducted the test; and

21 (10) the date that the testing occurred.

22 C. The state fire marshal shall make the
23 certifications available to the attorney general for purposes
24 consistent with the Safer Cigarette and Firefighter Protection
25 Act and to the taxation and revenue department for the purposes

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1 of ensuring compliance with this section.

2 D. Each cigarette certified under this section
3 shall be recertified every three years.

4 E. For each cigarette listed in a certification, a
5 manufacturer shall pay to the state fire marshal a fee of two
6 hundred fifty dollars (\$250). The state fire marshal may
7 adjust the amount of the fee by rule on an annual basis as
8 necessary to defray the costs of processing, testing,
9 enforcement and oversight activities required by the Safer
10 Cigarette and Firefighter Protection Act, but in no case shall
11 the fee exceed four hundred dollars (\$400). The state fire
12 marshal may establish the amount of the fee by rule on an
13 annual basis.

14 F. If a manufacturer has certified a cigarette
15 pursuant to this section, and thereafter makes any change to
16 the cigarette that is likely to alter its compliance with the
17 reduced cigarette ignition propensity standards required by the
18 Safer Cigarette and Firefighter Protection Act, that cigarette
19 shall not be sold or offered for sale in New Mexico until the
20 manufacturer retests the cigarette in accordance with the
21 testing standards set forth in Section 3 of that act and
22 maintains records of that retesting as required by Section 3 of
23 that act. Any altered cigarette that does not meet the
24 performance standard set forth in Section 3 of that act shall
25 not be sold in New Mexico.

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1 Section 5. MARKING OF CIGARETTE PACKAGING.--

2 A. Cigarettes that are certified by a manufacturer
3 in accordance with the Safer Cigarette and Firefighter
4 Protection Act shall be marked to indicate compliance with that
5 act. The marking shall be in eight-point type or larger and
6 consist of the letters "FSC", which signifies fire standard
7 compliant, and shall be permanently printed, stamped, engraved
8 or embossed on the package at or near the universal product
9 code.

10 B. A manufacturer shall use only one marking and
11 shall apply this marking uniformly for all packages, including
12 packs, cartons and cases, and for brands marketed by that
13 manufacturer.

14 C. A manufacturer certifying cigarettes in
15 accordance with Section 4 of the Safer Cigarette and
16 Firefighter Protection Act shall provide a copy of the
17 certifications to all wholesale dealers and agents to which it
18 sells cigarettes. Wholesale dealers, agents and retail dealers
19 shall permit the state fire marshal, the taxation and revenue
20 department and the attorney general to inspect markings of
21 cigarette packaging marked in accordance with this section.

22 Section 6. PENALTIES.--

23 A. A manufacturer, wholesale dealer, agent or any
24 other person who knowingly sells cigarettes, other than through
25 retail sales, in violation of Section 3 of the Safer Cigarette

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1 and Firefighter Protection Act may be assessed a civil penalty
2 not to exceed one hundred dollars (\$100) for each pack of the
3 cigarettes sold; provided that in no case shall the penalty
4 against any person or entity exceed one hundred thousand
5 dollars (\$100,000) for sales during any thirty-day period.

6 B. A retail dealer who knowingly sells cigarettes
7 in violation of Section 3 of the Safer Cigarette and
8 Firefighter Protection Act may be assessed a civil penalty not
9 to exceed one hundred dollars (\$100) for each pack of the
10 cigarettes sold; provided that in no case shall the penalty
11 against any retail dealer exceed twenty-five thousand dollars
12 (\$25,000) for sales during any thirty-day period.

13 C. In addition to any penalty prescribed by law,
14 any corporation, partnership, sole proprietor, limited
15 partnership or association engaged in the manufacture of
16 cigarettes that knowingly makes a false certification pursuant
17 to Section 4 of the Safer Cigarette and Firefighter Protection
18 Act may be assessed a civil penalty of at least seventy-five
19 thousand dollars (\$75,000), not to exceed two hundred fifty
20 thousand dollars (\$250,000) for each false certification.

21 D. A person violating any other provision of the
22 Safer Cigarette and Firefighter Protection Act may be assessed
23 a civil penalty for a first offense not to exceed one thousand
24 dollars (\$1,000), and for a subsequent offense subject to a
25 civil penalty not to exceed five thousand dollars (\$5,000) for

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1 each violation.

2 E. Whenever a law enforcement agency or duly
3 authorized representative of the state fire marshal discovers
4 any cigarettes for which no certification has been filed as
5 required by Section 4 of the Safer Cigarette and Firefighter
6 Protection Act or that have not been marked as required by
7 Section 5 of that act, the state fire marshal or law
8 enforcement agency may seize and take possession of the
9 cigarettes. Cigarettes seized pursuant to this section shall
10 be destroyed; provided, however, that, prior to the destruction
11 of any cigarette seized pursuant to these provisions, the true
12 holder of the trademark rights in the cigarette brand shall be
13 permitted to inspect the cigarettes.

14 F. In addition to any other remedy provided by law,
15 the attorney general may file an action in district court for a
16 violation of the Safer Cigarette and Firefighter Protection
17 Act, including petitioning for preliminary or permanent
18 injunctive relief or to recover costs, damages and attorney
19 fees. Each violation of the Safer Cigarette and Firefighter
20 Protection Act or of rules or regulations adopted under that
21 act constitutes a separate civil violation for which the state
22 fire marshal or attorney general may obtain relief. Upon
23 obtaining judgment for injunctive relief under this section,
24 the state fire marshal or attorney general shall provide a copy
25 of the judgment to all wholesale dealers and agents to which a

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1 cigarette has been sold.

2 Section 7. IMPLEMENTATION.--

3 A. The state fire marshal may promulgate rules and
4 regulations, pursuant to the Administrative Procedures Act,
5 necessary to effectuate the purposes of the Safer Cigarette and
6 Firefighter Protection Act.

7 B. The taxation and revenue department in the
8 regular course of conducting inspections of wholesale dealers,
9 agents and retail dealers, pursuant to the Cigarette Tax Act,
10 may inspect cigarettes to determine if the cigarettes are
11 marked as required by Section 5 of the Safer Cigarette and
12 Firefighter Protection Act. If the cigarettes are not marked
13 as required, the taxation and revenue department shall notify
14 the state fire marshal.

15 Section 8. INSPECTION.--To enforce the provisions of the
16 Safer Cigarette and Firefighter Protection Act, the attorney
17 general, the taxation and revenue department and the state fire
18 marshal, their duly authorized representatives and other law
19 enforcement personnel may examine the books, papers, invoices
20 and other records of any person in possession, control or
21 occupancy of premises where cigarettes are placed, stored, sold
22 or offered for sale, as well as the stock of cigarettes on the
23 premises. Every person in the possession, control or occupancy
24 of premises where cigarettes are placed, sold or offered for
25 sale is hereby directed and required to give the attorney

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1 general, the taxation and revenue department and the state fire
2 marshal and other law enforcement personnel the means,
3 facilities and opportunity for the examinations authorized by
4 this section.

5 Section 9. SAFER CIGARETTE AND FIREFIGHTER PROTECTION
6 ACT FUND.--The "safer cigarette and firefighter protection
7 fund" is created in the state treasury. The fund consists of
8 appropriations, income from investment of the fund, money
9 otherwise accruing to the fund, certification fees paid under
10 Section 4 of the Safer Cigarette and Firefighter Protection Act
11 and money recovered as penalties under Section 6 of that act.
12 Money in the fund shall not revert to any other fund at the end
13 of a fiscal year. Money in the fund is appropriated to the
14 state fire marshal to enforce the Safer Cigarette and
15 Firefighter Protection Act and to support fire safety and
16 prevention programs and shall be disbursed on warrants signed
17 by the secretary of finance and administration pursuant to
18 vouchers signed by the state fire marshal or the state fire
19 marshal's authorized representative.

20 Section 10. SALE OUTSIDE OF NEW MEXICO.--Nothing in the
21 Safer Cigarette and Firefighter Protection Act shall be
22 construed to prohibit a person or entity from manufacturing or
23 selling cigarettes that do not meet the requirements of Section
24 3 of that act if the cigarettes are or will be stamped for sale
25 in another state or are packaged for sale outside the United

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1 States and that person or entity has taken reasonable steps to
2 ensure that the cigarettes will not be sold or offered for sale
3 to persons located in New Mexico.

4 Section 11. CONTINGENT REPEAL.--The Safer Cigarette and
5 Firefighter Protection Act is repealed, effective on the date
6 that the New Mexico compilation commission receives
7 certification from the state fire marshal that the federal
8 government has adopted or enacted a reduced cigarette ignition
9 propensity standard and that the standard is in effect.

10 Section 12. STATE PREEMPTION.--The state preempts the
11 field of cigarette testing and standards. Cities, counties,
12 home rule municipalities and other political subdivisions of
13 the state shall not adopt or continue in effect any ordinance,
14 rule, regulation, resolution or statute on cigarette testing
15 and standards. The Safer Cigarette and Firefighter Protection
16 Act preempts any local law, ordinance or regulation that
17 conflicts with any provision of that act or any policy of the
18 state of New Mexico implemented in accordance with that act,
19 and, notwithstanding any other provision of law, a governmental
20 unit of the state of New Mexico shall not enact or enforce an
21 ordinance, local law or regulation conflicting with or
22 preempted by that act.

23 Section 13. EFFECTIVE DATE.--The effective date of the
24 provisions of Sections 1 through 6 and 8 through 11 of this act
25 is January 1, 2010.

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